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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 280, 281, 418

PHILLIPS PETROLEUM COMPANY; STATE OF TEXAS AND THE RAILROAD COMMISSION OF TEXAS; CORPORATION COMMISSION OF OKLAHOMA; AND STATE OF NEW MEXICO AND OIL CONSERVATION COMMISSION OF NEW MEXICO; FEDERAL POWER COMMISSION, *Petitioners,*

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF DETROIT, MICHIGAN; CITY OF KANSAS CITY, MISSOURI; CITY OF MILWAUKEE, WISCONSIN; COUNTY OF WAYNE, MICHIGAN; AND THE FEDERAL POWER COMMISSION, *Respondents.*

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

I.

OPINIONS BELOW

The opinions of the Court of Appeals for the District of Columbia Circuit (R. V. 1840-1856) are reported at 205 F. (2d) 706. The opinions of the Federal Power Commission (R. V. 1682-1822) are reported at 90 P.U.R. (NS) 325 and 10 F.P.C. 246.

JURISDICTION

The judgment of the Court of Appeals was entered May 22, 1953 (R. V. 1858). The petition for a writ of certiorari was filed on August 20, 1953 and denied by this Court on November 30, 1953. A petition for rehearing was filed on December 14, 1953. On January 18, 1954 this Court granted the petition for rehearing, vacated the order denying certiorari, and granted the petition for certiorari.

The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTION PRESENTED

Where Congress confers jurisdiction over *all* sales of natural gas in interstate commerce for resale, does subsequent language providing that the Natural Gas Act does not apply "to production or gathering of natural gas" nullify that jurisdiction with respect to all sales in interstate commerce for resale *except* those by pipeline companies?

STATUTE INVOLVED

Section 1(b) of the Natural Gas Act (Act of June 21, 1938, 52 Stat. 821; as amended 56 Stat. 83 and 61 Stat. 459, 15 U. S. C. 717 et seq.) reads as follows:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

INTEREST OF AMICI CURIAE

The National Institute of Municipal Law Officers (NIMLO) is an organization composed of over 800 municipalities, located in each of the 48 states, the District of

Columbia, and in the territories of Hawaii, Alaska and Puerto Rico. This brief is filed under rule 27(9)(d) of this Court. The members of NIMLO are political subdivisions of States and this brief is sponsored by their authorized law officers.

NIMLO member cities acting as spokesmen for consumers of gas residing within their corporate limits were among the sponsors of the Natural Gas Act of 1938 when it was adopted.[1] Since then these member cities have participated in innumerable rate and certificate proceedings before the Federal Power Commission (FPC) as representatives of consumers living within their corporate limits.[2] NIMLO members have participated in both FPC and Congressional consideration of the constant controversy over the issue involved in this case.[3]

This Court in considering the reasons why Congress enacted the Natural Gas Act has held that:

> "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies."[4]

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[1] Hearings before Committee on Interstate and Foreign Commerce, House of Rep., 75th Cong., 1st Sess. on H. R. 4008, March 24-25, 1937, pp. 46, 58, 59.

[2] As to municipal power to represent consumers, see *Wright* v. *Central Kentucky Natural Gas Co.*, 297 U.S. 537, and McIntire, *Municipalities as Legal Representatives of Consumer Interests* (1938) 4 LEGAL NOTES ON LOCAL GOVERNMENT 3.

[3] While this issue has been debated almost from the adoption of the Act in 1938 (cf. *Columbian Fuel Corp.*, 2 F.P.C. 200, 1940; *Interstate Natural Gas Co.*, 3 F.P.C. 416, 1943), FPC's consideration insofar as Phillips is concerned was initiated by Detroit in a motion filed Oct. 11, 1946 in *Michigan-Wisconsin Pipeline Co.*, 67 P.U.R. (NS) 427 and formally initiated by the FPC on Oct. 28, 1948. (FPC Opinion at R. V. 1686). The Moore-Rizley Bills, S. 734 and H. R. 4051, 80th Cong., 1st Sess.; Kerr Bill, S. 1498, 81st Cong., 1st Sess., and Lyle Bill, H. R. 3285, 82nd Cong., 1st Sess., each designed to exempt Phillips and similar sellers of natural gas in interstate commerce from FPC jurisdiction, none of which became law, have all been vigorously opposed by NIMLO members.

[4] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610.

The protection was provided by conferring jurisdiction upon FPC to prescribe just and reasonable rates for sales of natural gas in interstate commerce. FPC in this case has held that its jurisdiction does not extend to sales in interstate commerce by Phillips Petroleum Company, the largest seller of natural gas in interstate commerce in the Nation. This brief urges that the Court of Appeals was correct in reversing FPC's decision.

In the *Interstate*[5] case this Court recognized the necessity of controlling the price at which natural gas enters interstate lines. This Court said:

> "Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed."[6]

Here FPC has recreated the very situation the Congress sought to avoid. All Petitioners and *amici curiae* supporting Phillips seem to assume or concede that absence of FPC control means higher charges by Phillips. NIMLO members, as representatives of consumers, herein urge that FPC be ordered to carry out its statutory mandate to protect consumers from unjust and unreasonable charges by Phillips and similar sellers of natural gas in interstate commerce for resale.

STATEMENT OF FACTS

Phillips sells more natural gas in interstate commerce to pipelines than any other purveyor of this commodity (R. II. 739). It owns 25 processing plants in Texas, Oklahoma and New Mexico and has a part interest in 10 other such plants. Natural gas moves into these processing plants through its

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[5] *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682.

[6] *Ibid.*, pp. 692-693.

4,380 miles of pipeline located in Arkansas, Kansas, Oklahoma, Texas and New Mexico. (R. V. 1689).

In 1949 Phillips owned, or controlled by contract, 15.22 trillion cubic feet of proved gas reserves (R. V. 1689). In 1950 it sold 504 billion cubic feet of natural gas for $26,000,000 (R. I. 153).[7]

Phillips is a large wholesaler of natural gas in interstate commerce. About 50 per cent of the gas it sells in interstate commerce is purchased by it from other producers (R. III. 855).

Phillips sells natural gas in interstate commerce to 5 pipeline companies (R. V. 1690). These pipeline companies transport and resell this natural gas to local distribution companies in 14 states, i.e., Arizona, California, Oklahoma, Kansas, Nebraska, Iowa, Minnesota, Missouri, Illinois, Indiana, Michigan, Ohio, South Dakota, and Wisconsin. Phillips also sells to the pipeline serving the province of Ontario, Canada (R. V. 1690, 1827-1834). Forty-nine cities are served with gas sold by Phillips (Ex. I, A. R. III). As noted by this Court in *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157, 162, note 3, Phillips supplies a market of about 12,000,000 people in its sales to the two pipelines there involved.

The sales for resale in interstate commerce by Phillips which are involved in this case take place at meters located beyond the processing plants (R. V. 1687).

Phillips admits that its sales to the 5 pipeline companies are sales in interstate commerce for resale (R. V. 1712-1740). Phillips contends that its sales in interstate commerce are a part of its production or gathering and that the Act is therefore inapplicable to its sales.

Petitioners also contend that Phillips' sales in interstate commerce are exempt from FPC jurisdiction because of possible conflict with state conservation regulations. There

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[7] Since 1950 Phillips has continued to grow rapidly. The figures comparing its 1938 and 1952 sales and income are set forth *infra*, p. 31.

was much testimony about possible conflict between FPC regulations prescribing just and reasonable rates for sales of natural gas in interstate commerce and state conservation efforts, but not one witness testified that any actual conflict had taken place. It was admitted that in the many instances where FPC has already prescribed just and reasonable rates for pipeline companies which produce, gather, and process natural gas, no conflict with state conservation efforts had arisen (R. II. 478-485, 505-508, 576-587).

SUMMARY OF ARGUMENT

I

Prior to the passage of the Natural Gas Act of 1938 regulation of transportation and sales of natural gas in interstate commerce was nonexistent. This Court had held that the States were forbidden by the Constitution to carry out such regulation. And the Federal Government had not as yet acted. Because of this regulatory hiatus natural gas sellers in interstate commerce fixed their own prices and the consumer paid any price or rate these sellers exacted.

After extensive hearings on this problem the Congress enacted the Natural Gas Act of 1938. Its primary aim was to protect the consumer from exorbitant prices exacted by sellers of natural gas. The method chosen was to confer jurisdiction upon the FPC to regulate and fix just and reasonable charges for sales in interstate commerce—thus closing the hiatus.

II

Phillips is the largest seller of natural gas in interstate commerce to pipelines in the Nation. It is a producer, gatherer, transporter, and wholesaler, having 17.89 trillion cubic feet of proven gas reserves in 1952. It purchases as a wholesaler about 50 per cent of the gas it sells to pipelines from other producers. With 4,380 miles of gas lines

in Arkansas, Kansas, Oklahoma, Texas and New Mexico, and 35 processing plants, Phillips is a gigantic empire in itself. It sells gas after termination of producing or gathering to 5 pipelines serving 14 states and Canada—including some 49 municipalities.

Phillips admits that it makes sales for resale in interstate commerce and that it transports natural gas in interstate commerce. Both of these activities bring Phillips directly within the jurisdictional language of the Natural Gas Act.

Congress in considering the problem of consumer protection discovered by hearings that a "gap" in rate regulation existed wherein the states were constitutionally prohibited from acting and no Federal regulation existed. This "gap" was defined by this court in *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U. S. 83, and *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298, to include sales for resale in interstate commerce and transmission in interstate commerce. In that area the States are prohibited from regulating. Unless Federal regulation is adopted none exists. And that is the area where Phillips' sales and transporting here involved take place.

The statutory language that "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce" and "to the sale in interstate commerce of natural gas for resale for ultimate public consumption" are clear and unambiguous. Under these circumstances the rule of *Ex parte Collett*, 337 U. S. 55, denying resort to legislative history applies.

But if the actual legislative history of the Act is resorted to, one finds that it demonstrates that Congress did indeed know what it said—and said what it meant to say. The Report to the House on the bill (H. R. 6586, 75th Cong.), which became the Act, states that Congress intended by the language it used ". . . to fill the gap in regulation that

now exists by reason of the lack of authority of the State commissions." H. Rept. 709, 75th Cong., 1st Sess., p. 3. This Court on almost identical facts to those involved herein has held the jurisdiction of the Act does extend to and does close that gap. *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 689. Under the statutory language, the legislative history and this decision of this Court, Phillips is clearly within the jurisdiction of the Act.

IV

Faced with the clear and unambiguous language of the Act, direct proof in the quoted Committee report that Congress knew what it was doing and why, and the *Interstate* case, *supra*, Petitioners seek to find an escape route for Phillips in the inapplicability of the Act to "production or gathering of natural gas."

Petitioners say that in the industry there are three segments, independent producers and gatherers, pipelines and local distributors. They then say that Phillips is an "independent producer and gatherer" and based upon their "definition" they conclude that even though Phillips does sell in interstate commerce for resale, and does transport in interstate commerce, the fact that Phillips is also a producer and gatherer and wholesaler removes it from FPC regulation over these sales and this transporting. Again Petitioners in reality seek reversal of the *Interstate* decision, *supra*, in thus trying to rewrite clear language of the Act. There this Court, in disposing of a similar argument, said: "In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of the Congress to free companies such as Petitioner from effective public control. The purpose of the restriction was, rather, to preserve to the states powers of regulation in areas in which the states are constitutionally competent to act. . . " (331 U. S. 682, 690).

Since the States may not constitutionally regulate sales in interstate commerce for resale, it is clear that the purpose of Congress in adopting the Natural Gas Act was to confer jurisdiction upon FPC over these *sales* transactions. As the Congressional report also said "The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the states may not act." H. Rept. 709, S. Rept. 1162, 75th Cong., 1st Sess. p. 3. The definition of production or gathering urged by Petitioners seeks to rewrite the Act's explicit language so it will mean that "this field" was only *partly* occupied. Obviously, that is not what Congress intended.

Section 1(b)'s exemption of "production or gathering of natural gas" is completely divorced from its grant of jurisdiction over sales in interstate commerce. The identical House and Senate Reports on the Bill had this to say about the inapplicability of the Act to local distribution and to "production or gathering of natural gas": "The quoted words [of exemption] are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission." H. Rept. 709, S. Rept. 1162, *supra*, p. 7. Indeed, any other construction would negative Section 1(b) in its entirety.

When Phillips leaves the realm of producing or gathering of natural gas and becomes a seller, as in the instant case, it is subject to FPC regulation, not because it also produced or gathered natural gas but because it sold natural gas in interstate commerce for resale. It is the selling in interstate commerce which Congress regulated, not groups of persons as Petitioners contend.

To protect the consumer, Congress conferred jurisdiction on the FPC to regulate sales in interstate commerce for resale. It did not say to regulate some sales, or most sales, or only sales by pipelines. It said sales for resale in interstate commerce and thus Phillips, a seller who admittedly sells for resale in interstate commerce, is subject to this regulation.

Thus the attempt by Petitioners to confine the reach of the Act to sales by pipelines finds no support in the language of the Act, in its legislative history, or in reason. True, Congress could have confined the Act to sales for resale by pipelines, yet it did not. It could have exempted sales in interstate commerce during, or as a part of, the physical act of production or gathering, yet it did not. To write in such a provision now would scuttle explicit language and deny the whole legislative purpose of the Act.

Petitioners further urge upon the Court alleged legislative history which this Court considered and rejected in *Interstate* (331 U. S. 682). There as here great reliance is placed upon the "DeVane" testimony that under an earlier bill (H. R. 11662, 74th Cong.) in which jurisdiction was provided *only* over "transportation in high pressure mains in interstate commerce," sales during gathering were not covered. Petitioners never bridge the gap between that Bill and the Bill Congress adopted (H. R. 6586, 75th Cong.), which covers all transportation and all sales for resale in interstate commerce—a very different bill.

Significantly, no one testified on H. R. 6586 in the same vein as did Mr. De Vane on H. R. 11662 of the earlier Congress. Nor could they have done so because of the broadened jurisdiction in the later bill. And Senator Wheeler who was in charge in the Senate of the Bill adopted by the Congress made it crystal clear in his explanation thereof that *producers* selling in interstate commerce "would have to sell it [gas] at the price fixed by the Commission." 81 Cong. Rec. 9314.

Clearly the real legislative history of the Bill adopted by the Congress furnishes no basis for the claims of Petitioners. Congress, in referring to the inapplicability of the Act to "production or gathering of natural gas," did not intend to create a "regulation free" area such as that for which Petitioners contend.

V.

In the *Interstate* case, *supra*, this Court upheld the distinction expressly drawn therein by FPC in its opinion (3 F.P.C. 416, 420-421) between *production and gathering* and *sales in interstate commerce*. This Court has also said that " . . . transportation and sale do not include production or gathering," *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 598. Yet, Petitioners seek by opinion testimony to dispute these findings. The ultimate conclusion Petitioners seek from Phillips' witnesses on this point is that when Congress adopted the Act, it did not intend to cover Phillips' sales because its sales in interstate commerce are in reality part of its producing and gathering.

Since opinions of authors of legislation expressed 5 or more years after an Act is adopted may not be accepted as showing legislative intent (*Ramspeck* v. *Federal Trial Examiners Conference*, 345 U. S. 128, 143, note 9), it is not believed that these self-serving assertions of Phillips' witnesses uttered 12 years after the adoption of the Act are acceptable to show legislative intent. Especially is this true where the Act's provisions are clear and unambiguous and this Court has heretofore found that Congress meant what it said.

VI.

Leaving legislative history, Petitioners seek support for their contentions in prior decisions of the FPC which they argue have consistently upheld their position. But there one finds "The Federal Power Commission has wobbled all over the face of the earth with respect to this problem." Senator O'Mahoney, 96 Cong. Rec. 4171. The Commission's members have at times been torn by dissension and differences of opinion and FPC acknowledges this "uncertainty" in its brief, pp. 71-72. *Columbian Fuel Corp.*, 2 F.P.C. 200 (1940), cited by Petitioner, is an example; but reference to the fact that the Commission expressly stated that it was not assuming jurisdiction *at that time* and would

await further developments is omitted. And the FPC's opinion in the *Interstate* case, as quoted page 23, *infra*, expressly rejects the basic contention of Petitioner by distinguishing between sales in interstate commerce and production and gathering.

This Court has recognized this FPC uncertainty on this issue. *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*, 337 U. S. 498, 516-517. But neither this division of opinion, nor a failure to exercise expressly conferred jurisdiction, can override the mandate of Congress as expressed in the Act.

The only means by which FPC could be divested of jurisdiction is by Congressional action. Attempts at this have failed. (See Moore-Rizley Bills, S. 734 and H. R. 4051, 80th Cong., 1st Sess.; Kerr Bill, S. 1498, 81st Cong., 1st Sess.; and Lyle Bill, H. R. 3285, 82d Cong., 1st Sess.)

VII.

Much stress has been placed by Petitioners upon State conservation of gas and infringement upon it by FPC control. But the Act itself is not cited. Petitioners' reliance is on non-decisive statements in the *Interstate* case, *supra*, and *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 340 U. S. 179. The question of conflict was, however, dispensed with by the Court in both cases, and rejected in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 607-609, and *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 600, 603.

In *Interstate*, conflict was alluded to only as regards regulation by the States of local sales, a situation not present here. In *Cities Service* the Court expressly stated that there was a limit beyond which the States could not go in burdening interstate commerce; if that limit is overreached, the States must withdraw. The FPC recognizes this when it states on p. 86 of its brief that if the Federal statute clearly authorized the exercise of FPC power, such a conflict would not bar the Federal jurisdiction.

No one has shown any evil or conflict in FPC's acting as umpire between producer and consumer to fix fair prices. FPC is required to act to protect consumers from unconscionable prices by fixing just and reasonable rates on sales in interstate commerce for resale. Oklahoma fixes *minimum* rates on sales by Phillips to protect landowners, producers, and royalty owners. No State does fix, or can constitutionally fix rates for sales in interstate commerce to protect consumers.

The only evidence of purported conflict in the instant case is supplied by members of State regulatory bodies in producing States as answers to questions based on hypothetical situations. No situation has yet arisen wherein such a conflict has been shown, and at present conflict is mere conjecture.

VIII.

The natural gas industry has increased tremendously in size since the passage of the Act. Pipelines have now been constructed to many major cities not served in 1938. An estimated 40,000,000 users have been made dependent on natural gas. If the protective jurisdiction which the Congress bestowed upon FPC is destroyed, these dependent users will have to pay whatever price the sellers in interstate commerce for resale exact—either that or have their great investment in burner equipment destroyed.

A sharp rise in field prices of natural gas (which prices are passed directly on to the ultimate user at his burner tip) is already in evidence. Escalator clauses (providing price increases not based upon increased costs) and "favored nation" clauses (providing for payment to a seller under contract of the highest price paid later to any seller in his particular field) carry contract prices ever upward. With no FPC regulation, the sky will be the limit as supply is far behind demand.

It has been conservatively estimated that if FPC jurisdiction is held to be lacking, users will be faced with price increases amounting to $200,000,000 annually. In the light

of this, Petitioner Phillips' bold assertion in its brief (p. 85) that there is no need for regulation to protect users is indeed astounding. Congress never intended such a situation to exist.

ARGUMENT.

I. The Natural Gas Act of 1938 Was Passed to Protect Consumers Against Exploitation by Filling the Gap in Regulation Established by Decisions of This Court Holding That States Are Constitutionally Prohibited From Regulating Sales of Natural Gas in Interstate Commerce.

The Congress enacted the Natural Gas Act of 1938 to protect consumers from unjust and unreasonable charges by sellers of natural gas in interstate commerce where the gas is sold for resale to consumers. The evidence presented to Congressional committees indicated that consumers were being charged exorbitant prices by these sellers. This Court found in the *Hope* case as quoted *supra,* page 3, that the Act was intended "to protect consumers against exploitation at the hands of natural gas companies." And it was pointed out that under *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298 and *Public Utilities Commission* v. *Attleboro Steam and Electric Co.,* 273 U. S. 83, the States are constitutionally unable to protect consumers by regulating these sales in interstate commerce. The identical reports of the Senate and House Committees on the Bill (H. R. 6586) which became the Natural Gas Act cite these cases and then state:

> "The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not Act."[8]

These reports also state:

> "Your Committee believes that this legislation is highly desirable to fill the gap in regulation that now

[8] S. Rept. 1162, 75th Cong., 1st Sess. and H. Rept. 709, 75th Cong., 1st Sess. p. 3.

exists by reason of the lack of authority of the State commissions.'"[9]

In *United States* v. *Public Utility Commission of California*, 345 U. S. 295, at page 311, this Court said:

> "Especially in litigation arising under the Gas Act has this Court expressed the view that the limitations established on Commission jurisdiction therein were designed to coordinate precisely with those constitutionally imposed on the states."

It is, therefore, clearly established that the Congress intended to fill this "gap" in natural gas regulation. The area where the consumer needed protection was clearly and precisely defined as that area which the States are constitutionally prohibited from regulating, i.e., sales for resale in interstate commerce. This Court has so held in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U .S. 682, 689-690; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 599-600; and *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 324, 334-335. In these cases this Court has also held that the language used by the Congress is broad enough to close the "gap."

In the *Interstate* case, *supra*, upon facts almost identical with those of the instant case, this Court said (pp. 689-690):

> "In a series of decisions announced prior to the passage of the Act, this Court had held that, although Congress had not acted, the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States."

and further, on sales in interstate commerce in Louisiana for resale in interstate commerce this Court there said, (pp. 682-693):

> "It cannot be doubted that their regulation is predominantly a matter of national, as contrasted to local

[9] *Ibid.*, p. 3.

> concern. All the gas sold in these transactions is destined for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed."

Phillips admits that its sales are sales in interstate commerce (R. V. 1712, 1740). The brief recitation of facts, *supra*, pages 4-6, shows that Phillips operates on a tremendous scale. It produces and gathers for its 35 processing plants in 5 different states and supplies pipelines serving 14 states and Canada. About 50% of its gas is bought at wholesale, from others, and resold to pipelines. It now has 17.89 trillion cubic feet of proven national gas resources (*infra*, p. 31).

Applying the principles established by the legislative history, as interpreted by this Court, it is clear that the sales by Phillips involved here are precisely the sales in interstate commerce for which the Congress intended to provide FPC regulation.

If FPC regulation under the Natural Gas Act does not reach Phillips, its sales in interstate commerce for resale are free of all regulation. For as demonstrated above the States are constitutionally prohibited from regulating these sales. The Congress could not have used broader, or more clear, or more definite language than it did use.

Petitioners seek to recreate a "twilight zone" wherein Phillips' charges for sales in interstate commerce cannot be regulated either by FPC or by the States.[9a] They say that in spite of the broad jurisdictional coverage of the Act of sales in interstate commerce for resale, the subsequent language making the Act inapplicable to "production and gathering of natural gas" serves to open the very gap the

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[9a] See testimony of Mr. Don Emery, General Counsel for Phillips on Moore-Rizley Bill in support of a twilight zone, Hearings on H. R. 4051, *supra* note 3, at pp. 67-74.

Congress said it had closed. This Court has held in the *Interstate* and other cases, *supra,* that the Congress accomplished its aim. No basis for reversal of those decisions is here advanced by Petitioners.

In their identical Reports, the House and Senate Committees[10] said that the language making the Act inapplicable to local distribution of natural gas and "to the production or gathering of natural gas" is:

> ". . . not actually necessary, as matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission."

If this language was "not actually necessary" it was certainly not intended to destroy any of the jurisdiction over sales in interstate commerce for resale. Yet that is what Petitioners contend. In the *Interstate* case, *supra,* this Court held most emphatically (331 U. S. at 690):

> "In denying the Federal Power Commission jurisdiction to regulate the production and gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act."

The recent decision in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 337 U. S. 157, holds that a part of the sales here involved—sales not unlike all sales here involved—are beyond the Constitutional reach of the States. Under these circumstances it is clear that the Congress intended the jurisdictional coverage to reach all sales in interstate commerce for resale. Congress explicitly said there was no clash between such sales and the regulatory efforts of the States with respect to production and gathering. The Reports of the Congressional Committees, the language of the Act, and the prior decisions of this Court cited above

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[10] *Supra,* note 8, p. 7.

are unanimous in clearly placing Phillips' sales in interstate commerce for resale under the jurisdictional reach of the Act. Petitioners' claims of exemption are without merit.

Since the Act reaches all sales in interstate commerce for resale by Phillips—without regard to where they take place —and since there is no conflict between such jurisdictional provisions and the exemption of "production or gathering of natural gas", the legal conclusion of a majority of the FPC that Phillips' sales in interstate commerce for resale are exempt from regulation as a part of production and gathering is erroneous, and was properly reversed by the Court of Appeals. Further, under the undisputed facts, these sales take place after physical production[11] and gathering have ended with the final co-mingling of the gas in the processing plants. (FPC brief, p. 8, Phillips brief, p. 7). Delivery to the pipelines takes place beyond the processing plants, (R. V. 16 [illegible]-1711), and after all production and gathering have ended. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 167.

II. The Proper Legislative History of the Act Furnishes No Basis for Overriding the Jurisdiction Over Phillips Which Is Conferred by Clear and Unambiguous Language.

Petitioners seek to overcome the effect of the Committee reports[12] on the Bill (H. R. 6586, 75th Cong.) which became the Act, and the decisions of this Court already cited herein, by directing attention chiefly to the testimony of the then Solicitor of FPC on a different bill introduced in an earlier Congress (H. R. 11662, 74th Cong.). Petitioners rely

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[11] In the *Interstate* case, *supra* (331 U. S. 682), at p. 690 this Court emphasized this physical aspect when it said:

> "Clearly, among the powers thus reserved to the States is the power to regulate the *physical* production and gathering of natural gas in the interests of conservation or any other consideration of legitimate local concern." (Italics supplied.)

[12] H. Rept. 709, 75th Cong., 1st Sess., S. Rept. 1162, 75th Cong., 1st Sess.

on the rather ambiguous statements of Mr. DeVane that sales during gathering were not then covered by H. R. 11662. That earlier Bill proposed FPC jurisdiction only over "transportation of natural gas in high-pressure mains in interstate commerce." It did *not* cover sales in interstate commerce for resale, as *did* H. R. 6586, the Bill actually adopted by the Congress.

Interestingly enough no witness gave testimony on H. R. 6586 similar to Mr. DeVane's testimony on H. R. 11662. That silence is most significant.

But any ambiguity created by Mr. DeVane's statements was removed and any contrary inference overriden, at a later date by Senator Wheeler, Chairman of the Committee in charge of the Bill (H. R. 6586) when he expressed the view (83 Cong. Rec. 2422) that:

> "The courts have held that sales for resale, or so called *wholesale* sales in interstate commerce, are not subject to State regulations.
>
> "*Neither the sending nor receiving State may regulate the wholesale rates.* The consumption of natural gas in the States is secured for the most part through interstate transmission, and the cost thereof is a very material element in determining the price the local consumers must pay for their gas." (Italics supplied)

And at page 2424, the Senator said:

> "Federal jurisdiction plus the jurisdiction of the several States should be so utilized and coordinated as to produce effective regulation and the termination of existing abuses to the end that there should be no unregulated twilight zone. Otherwise our system fails in a very crucial situation."

In the debates on the bill Senator Connally asked Senator Wheeler (81st Cong., Rec. 9314):

> "If a man should produce gas in my state and ship it in interstate commerce, then he would have to sell it at the price fixed by the Commission?"

Senator Wheeler replied:

> "Exactly; at the wholesale price fixed by the Commission."

Here the jurisdictional problem relates to sales in interstate commerce for resale by Phillips. These are in fact "wholesale" sales as described by Senator Wheeler. And as stated above, Phillips also acts as a "wholesaler" for gas purchased from other companies—50% of its sales being of gas purchased from other producers or gatherers.

In any event the legislative history is immaterial in the light of the pronouncements of this Court in such cases as *Ex parte Collett,* 337 U. S. 55. The Court stated at page 61:

> "... there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.'"

Petitioners seek to make a sale in interstate commerce for resale mean a sale by pipeline only, but that is not what Congress said. If Congress did not mean to include *all* sales in interstate commerce for resale, it would have and could have so stated quite simply. If it had meant only *some* of the sales in that category, it would have said that. If it wanted to control only sales by pipelines, or only sales made at the city gate, as Petitioners contend, it would have said that. If selling in interstate commerce means the same as gathering, then all pipelines owning their own supply of gas escape regulation. No producing State controls price at the inception of the pipeline for the benefit of the consumers. Congress obviously knew this. Petitioners say that Congress denied consumers such protection—yet Congress did not do so in the express language of the Act.

III. Petitioners' Attempt to Limit by Opinion Testimony the Constitutional Power of the Congress Over Sales by Phillips in Interstate Commerce Has No Basis in Law or Fact.

Petitioners seek to develop the statutory words "production or gathering of natural gas" by opinion testimony into the industry-coined phrase "independent producers and gathers"—meaning all non-pipeline producers and gatherers (*Phillips brief P. 18-27, FPC Brief 9-17*). By this testimony which includes sales in interstate commerce as a part of production or gathering, Phillips would be freed of regulation. Yet that is not what the Congress said or had in mind. Congress had in mind producing or gathering by everyone, including Phillips and all pipelines. Congress also had in mind sales in interstate commerce by everyone, including Phillips and all pipelines. This has been shown by the preceding Sections of this brief. There is no ambiguity as to what Congress meant by the words "production or gathering of natural gas". That too has already been demonstrated in the preceding parts of this brief. Under these circumstances resort to opinion testimony of others to establish legislative intent is unwarranted. *Ex parte Collett*, 337, U. S. 55, 61.

Yet, for page after page Petitioners (FPC brief 9-17, Phillips brief 18-27, 67-73) contend that opinions expressed by Phillips employees to the effect that all of Phillips' activities, including its sales in interstate commerce, are part of "production or gathering", establish Phillips exemption from regulation under the Act. Petitioners thus seek to take from the reach of the statute all sales by Phillips in interstate commerce and limit the coverage of the Act to resale in interstate commerce by pipelines only. Such novel use of opinion testimony—self-serving and totally lacking in factual basis as it is, and based on hypothetical propositions—cannot becloud the real issues before this Court. In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, this Court has already said (p. 598): ". . . transportation and sale do not include production or gathering".

The issue before the Court is not what Phillips employees want to say in their testimony in 1951 as their opinion of what Congress said in 1938. The issue is what Congress said in the Act. There can be no dispute but that Congress chose words to cover those phases of the sale of natural gas in interstate commerce which are in issue here, i.e., sales in interstate commerce for resale which the States could not constitutionally reach. Witnesses in lawsuits based upon the Act cannot now increase the powers of the States or lessen the powers conferred by Congress upon FPC by the express language of the Act. What Congress said is crystal clear from the words of the Act. And while it is totally unnecessary to resort to legislative history, when one does analyze the legislative history as has been done herein (pp. 18-20), such analysis reveals that Congress did indeed know what it said. Thus, when weighed against the language of the Act, the legislative history of the Act, and the decisions of this Court on the correct interpretation of the Act, this opinion testimony is revealed to be totally lacking in basis or substance.[13] In *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653, 659-660, the Court rejected the "fiction" of "Calling interstate commerce local commerce in order to sustain its local control."

This testimony of Phillips is in interesting contrast to the testimony given at the Hearings on the Moore-Rizley and Kerr Bills where the so-called "independent producers and gatherers" asked exemption because they were within the scope of the Act.[14]

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[13] This Court has rejected the opinion of the Author of an Act, as to its scope when expressed 5 years after the Act became law. *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U. S. 128, 143, N. 9.

[14] Hearing on H. R. 4051 before Sub-committee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 2d Sess. (1948), pp. 67-74, 357, 358. Hearings on S. 1498 before a Sub-committee of the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess. (1949), pp. 35, 79, 80, 81, 84, 105, 107, 109, 149, 153, 154, 158, 160, 388, 412, 422, 427, 434, 442-444, 453 and 454.

It has already been shown herein that Congress intended to fill the "gap" in regulation of sales of natural gas in interstate commerce by exercising the full constitutional power of the Federal government. It is not believed that these sales of Phillips in interstate commerce which Congress has the constitutional power to regulate can be withdrawn from the reach of that power by opinions of witnesses that such sales are "production or gathering of natural gas". Sales in interstate commerce and production or gathering are entirely different actions. As FPC said in *Interstate Natural Gas Co.*, 3 F. P. C. 416 (1943), affirmed 331 U. S. 682:

> "When the distinction between production and gathering of natural gas, and the sale of such gas in interstate commerce is kept in mind, effect is given the Congressional objective."

Congress made no distinction between sellers of natural gas. Congress made no distinction based upon where sales in interstate commerce take place. It provided for regulation of all sales in interstate commerce by all sellers. That objective is clear and the language carrying out the objective is clear and unambiguous. No amount of evidence on what the industry considers to be encompassed within "independent producer and gatherer" can override that language.

IV. FPC Opinion Has Fluctuated With Changes of Membership and Mind and Its Administrative Interpretations Provide No Consistent Construction Favoring Regulatory Freedom for Phillips.

FPC in its brief (pp. 65-73) contends that FPC has uniformly interpreted the Act to exclude sales in interstate commerce for resale such as those involved in this case. But at pages 71-72 it then concedes:

> "... there has been some uncertainty as to the application of the 'gathering' exception to the situation here involved."

And in fact FPC opinion on this important matter has wavered according to its changing membership, and according to changes of mind by individual FPC Commissioners over the years. The dissent of Commissioner Buchanan adequately sets forth the facts on this subject. He states the facts as to the inconsistencies of the Commission on this issue since the passage of the Natural Gas Act of 1938 and the membership changes and changes of mind which have played such a prominent part therein. (R. V. 1774-85, 10 F. P. C. 246, 307-315).

In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 at pages 516-517, this Court recognized that there was

> "... uncertainty of opinion in the Commission as to the reach of the act toward sales by independent producers and gatherers of Natural Gas Companies for transportation in interstate commerce."

In the *Columbian Fuel Corp. case*, 2 F. P. C. 200, upon which Petitioners strongly rely, the FPC held that it was not the intent of Congress to regulate companies whose only sales of natural gas in interstate commerce are made as an incident to, and immediately upon completion of such persons' production and gathering of said natural gas if these persons are not otherwise subject to the jurisdiction of the Commission. *It further stated,* however, that if experience revealed that through affiliation, field agreement or dominant position in a field, an unreasonable price might be maintained, the Commission will decide whether it can assume jurisdiction (p. 208).

Immediately after this case *Peoples Natural Gas Co. et al.* v. *Federal Power Commission*, 127 F. (2d) 153 (App. D. C. 1942) arose. Peoples relied on the *Columbian* case and asserted that the Federal Power Commission lacked jurisdiction. The United States Court of Appeals for the District of Columbia Circuit, in ignoring the *Columbian* case stated at P. 155:

"We cannot disregard the plain language of the Act because the Commission—*at one time* interpreted it narrowly." (Italics supplied)

Subsequent to the *Peoples* case the Commission began regulating natural gas sales by the Interstate Natural Gas Co. to three interstate pipeline companies, one of which was affiliated with Interstate.

The FPC submitted a report on April 10, 1947, to the Committee holding hearings on the Rizley Bill. It stated its opposition to the Bill at that time, feeling that the outcome of the *Interstate Natural Gas Co.* case, which was pending decision, should be awaited. (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Cong., 1st Sess., on H. R. 2185, H. R. 2235, H. R. 2292, H. R. 2569 and H. R. 2956, p. 10.)

On June 16, 1947 this Court held Interstate was subject to regulation by the FPC. (*Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682).

On August 7, 1947 the four member Commission issued Order No. 139, from which Commissioner Draper dissented, and which in effect repudiated the *Interstate* decision. It construed Sec. 1(b) as including arm's length sales of natural gas by independent producers and gatherers made during the course or upon completion of processing and gathering.

In April of 1949 the Commission appeared at the Hearings before the Interstate and Foreign Commerce Committee of the House on the Lyle-Harris Bills, H. R. 79 and 1758 and opposed the bill on the ground that it would deprive the Commission of jurisdiction that the Supreme Court stated it possessed. A like position was taken in the Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on the Kerr Bill, S. 1498, 80th Cong., 1st Sess., p. 500.[15]

[15] The majority consisted of Commissioners Buchanan, Draper and Olds; Commissioners Smith and Wimberly submitted a minority report. (R. V. 1810).

Finally, on July 11, 1950 the Commission issued Order No. 154 which rescinded Order No. 139 stating it was inconsistent with the requirements of the Natural Gas Act.

The *Phillips* decision restored the Commission to its 1940 position. Since 1940 its position has been vacillating. However, it has never definitely stated that it did not have jurisdiction, *per se.* Even Order No. 139 never went that far. The Commission has merely declined to exercise what was delegated to it by the Congress.

Thus, the jurisdiction which Congress delegated to the Federal Power Commission over transactions that Phillips and like concerns engage in has always been present. Misinterpretation or wilful abeyance of its use is immaterial. And the argument of FPC that its interpretation is "entitled to great weight" (Brief, p. 66) is lacking in merit, where, as here FPC has fluctuated back and forth on the issue before the Court.

Assuming, *arguendo,* that the Commission did desire divestment of its jurisdiction, its mere statement alone would be insufficient to attain this result. Congress has conferred it, Congress must abrogate it. In the Moore-Rizley, Kerr and Lyle Bills Congress has been offered the opportunity but declined to act. It is present and it can and must be utilized, if the consumer is to be afforded any protection at all.

V. The States Can Exercise No Control for Consumer Protection Over Maximum Prices Charged for Sales in Interstate Commerce by Sellers Such as Phillips and FPC Protection of Consumers Will Not Conflict With State Conservation Programs.

Petitioners' contention that FPC regulation will conflict with State conservation efforts has been formerly proferred and expressly rejected by this Court, *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 607-9, 613-14; *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 600, 603.

In considering West Virginia's contentions regarding conflict with conservation this Court stated in the *Hope* case at pages 613-614:

> "Thus Congress was quite aware of the interests of the producing states in their natural gas supplies. But it left the protection of those interests to measures other than the maintenance of high rates to private companies. If the Commission is to be compelled to let the stockholders of natural gas companies have a feast so that the producing states may receive crumbs from that table, the present Act must be redesigned. Such a project raises questions of policy which go beyond our province."

The premise of conflict is absolutely unwarranted. Oklahoma sets minimum wellhead prices on all gas taken from one field and specifically directs producers in this field, which also operate interstate gas pipeline systems, to take gas from another producer in the same field at such price. These operations have been upheld by this Court in *Cities Service Gas Co.* v. *Peerless Oil and Gas Company,* 340 U. S. 179 and a companion case, *Phillips Petroleum Company* v. *State of Oklahoma,* 340 U. S. 190.

In the opinions regarding these two cases, however, the Court was at pains to point out that there is a limit to which the States may go and that this limit was not reached in the cases under consideration. The Court states in the *Cities Service* case at p. 786:

> "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions."

Petitioners' reliance upon conflict with State conservation (through control of production) to nullify FPC regulation of sales to pipelines in interstate commerce is not placed upon the provisions of the Natural Gas Act. Such

reliance flows from a statement by this Court in the *Interstate* case, *supra,* where the Court merely noted that the claim of interference with State conservation was without merit. The only real difference between *Interstate* and the instant case is that the majority of the FPC use the statement in *Interstate* to limit the reach of the statute to sales by pipelines; no such limitation appears in the Act. To stretch non-decisive language of this Court to the point of abrogating statutory language is untenable.

No State controls maximum prices charged for natural gas for the purpose of protecting consumers from price gouging by sellers who have a monopoly on supply to certain pipelines, and thus to fixed markets. Therefore, no conflict exists between State and Federal jurisdictions. Congress acted to protect consumers from price gouging by suppliers and sellers enjoying a monopoly in certain markets in interstate commerce. The States act to protect producers, landowners and royalty holders.

Should the FPC not be allowed to exercise the jurisdiction conferred upon it by Congress, and assuming that the States do attempt to regulate Phillips' prices on sales, is anyone naive enough to think that Phillips and like concerns will not immediately seek the protection afforded by the interstate commerce clause and thus avoid any regulation at all? The States could not, as stated *supra,* circumvent the basic constitutional premise that they may not burden interstate commerce. This is the precise reason for giving the FPC jurisdiction. No evidence has been or can be shown to exhibit any real conflict. This argument should be summarily rejected.

VI. Claim of Phillips That Consumers Need No Protection Is Without Basis in Fact—Since 1938 Natural Gas Sellers Have Increased Their Sales to Such Immense Proportions in a Monopolistic Market That the Concern Shown by Congress in Regulating Them Has Been Fully Justified.

Phillips makes the astonishing claim that consumers need no protection against excessive prices charged by sellers in interstate commerce like itself (Brief pp. 85-94). While this

claim is one of policy and properly addressed to the Congress rather than this Court, it requires some response because Petitioners seek to use it to prove lack of Congressional intent to cover Phillips under the jurisdictional provisions of the Act.

The brief *amici curiae* of the states of Louisiana, Mississippi, North Dakota, Wyoming, and Kansas, filed in support of Phillips, states that this Court recognized in the *Interstate* case that FPC jurisdiction over these sales in interstate commerce means a lower price to the consumer (p. 6). And the position is taken that such regulation is unwise and impractical in this "risk-taking and financially hazardous industry" (p. 4).

The States of Texas, Oklahoma and New Mexico in their brief as Petitioners take the position that ". . . any argument that the states have no power to regulate the particular sales involved is wholly beside the point. It is sufficient that rate regulation of sales by the Commission (FPC) will interfere with the exercise of any legitimate conservation power of the States." In essence both Phillips and these producing States argue for no control over prices charged by sellers of natural gas in interstate commerce, contending that protection of consumers is outweighed by the needs of the sellers. Phillips goes so far as to contend that "fear" of FPC rate regulation would lead sellers to refuse to sell their gas to any one subject to FPC regulation (Brief, p. 82). Totally unexplained is what they will do with the gas if they do not sell it. Also unexplained is why sellers "fear" FPC regulation which really requires only that they be paid just and reasonable prices.

Neither Phillips nor these producing States, in reciting the burdens and difficulties of sellers of natural gas, cite the tax exemption benefits now enjoyed by all producers of gas of "27½ per centum of the gross income from the property during the taxable year." Internal Revenue code, (26 U.S.C. Sec. 114(b)(3). But those benefits have as much to do with the statutory interpretation problem here in-

volved as their other arguments. It is certainly a major part of the overall oil and gas picture to which Petitioners devote much of their argument.

The experience under the Act and the rapid expansion of the industry as reviewed in this section of this brief confirms completely that the Congress was fully justified in concluding that regulation of sales of natural gas in interstate commerce was necessary. In spite of Petitioners' contrary contentions, such regulation could not be effective if it did not cover sales in interstate commerce *to* as well as *by* pipelines.

1. Initial experience was one of decreasing rates.

After adoption of the Natural Gas Act of 1938, the FPC moved immediately to exercise the jurisdiction delegated to it by Congress and began regulating rates charged for natural gas sold in interstate commerce for resale.

Between the years of 1938 and 1946, there was an average total reduction in rates of $157,000,000 in states such as Illinois, Kansas, Nebraska, Ohio, Pennsylvania, New Mexico, Wyoming, Kentucky, Missouri, Michigan, Indiana and the communities of Chicago, Baton Rouge, Cleveland, Toledo, Denver, Cheyenne, Detroit, Ann Arbor, Ft. Wayne and Dallas, to mention a few (Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, 80th Cong., 1st Sess. on H. R. 2185, 2235, 2292, 2956, 2569, at p. 463). This shows the protection that the Act afforded consumers in enabling them to obtain a necessary product at a reasonable figure.

2. Prices have crept ever upward as market demands have exceeded gas supply.

As more and more pipelines were completed and the market demand grew for natural gas, the prices demanded by sellers such as Phillips began to creep upward and upward. Demand far outstrips supply and sellers such as Phillips enjoy a commanding position because of this fact.

Phillips itself has grown tremendously. Its sales of natural gas have increased from 228,107,329,000 cu. ft. in 1938 to 560,000,000,000 cu. ft. in 1952. In 1938 its gross operating income and net income was $111,899,261 and $10,232,354, respectively. This is in marked contrast to its gross operating income of $720,527,888 and a net income of $75,284,261 in 1952. Phillips' proved reserves of natural gas were 17.89 trillion cubic feet in 1952. (Moody's Manual of Investments, 1939, p. 1942; SEC file 1-720, May 1, 1953). Phillips is the largest seller of natural gas to pipeline companies in the Country. Evidence of this is found in the hearings on the Kerr Bill (S. 1498), wherein the FPC's report showed that 600 independent producers sold over 1000 billion cu. ft. of natural gas to 32 pipeline companies, but two-thirds was sold by the 25 largest vendors and 47.6 per cent or nearly one-half was sold by 10 of these 600. Of these 10, Phillips is the number one seller by a wide margin. (Hearings, before a Subcommittee of the Senate Committee on Foreign and Interstate Commerce on S. 1498, 81st Cong., p. 8 and p. 18, table 14. Also R. II-5746).

And the increase in the size of the entire industry sheds a great light on the enormity of the problem in issue as to its effect on Consumers.

The number of natural gas utility customers has increased from approximately 6,500,00 in 1938 to 18,500,000 in 1952. This number is further increased to an estimated 40,000,000 when the families of these customers are taken into consideration. (*Thirty-third Annual Report of the Federal Power Commission* (1953) p. 18, Graph 1.) From these figures it can be seen that there has been an approximate 300 per cent increase in users served who are dependent upon these gas companies for heat, cooking facilities and the other services provided and needed.

Sales of natural gas have increased from a total of 1,200 billion cubic feet in 1938 to a total of 4,800 billion cubic feet in 1952. (*Thirty-third Annual Report of the Federal Power Commission,* (1953), p. 19) The miles of

utility gas mains have increased from 184,900 in 1938 to 367,900 in 1952. This includes field, gathering, transmission and distribution but excludes service pipe. (*Gas Facts,* published by the American Gas Association, 1952, p. 62, Table 39). These facts demonstrate the fabulous increase in size which the industry has experienced.

The national significance and the impact which an enterprise of this magnitude has upon the country, its people and its economy is, to say the least, tremendous.

That this growth is ever on the increase is evidenced by natural gas utility revenues. Excluding revenues from sales, for resale, this amount has increased from $406,352,000 in 1938 to $1,960,789,000 in 1952, five times the 1938 figure! (*Gas Facts,* published by the American Gas Association, 1952, p. 132, Table 95.)

It is respectfully submitted that these statistics are more compelling than any words could possibly be. This industry has become gigantic in scope. It should, in the interests of the States and cities, and their inhabitants, be subject to the closest scrutiny and regulation to insure that equal justice is afforded both gas sellers and users. When the Natural Gas Act was passed in 1938 this was the prime consideration, the need is even greater now and this consideration cannot be too strongly stressed. From an embryo industry it has emerged into one which has the capabilities of placing millions of users at its mercy if it is not controlled to insure fair play. Sellers of gas like Phillips, who want to enjoy the benefits of sales in a monopoly market in interstate commerce, cannot justly complain that Congress set up FPC to act as umpire to insure fair treatment of both sellers and users. Phillips seeks the Utopia of enjoying a monopoly market with no control over what it charges.

3. An estimated 40,000,000 users will be at the mercy of uncontrolled prices by Phillips and similar sellers of gas in interstate commerce should Petitioners prevail herein.

These estimated 40,000,000[14] users of natural gas, 1 out of 4 persons in the United States, deserve, and as a matter of right should be granted, the protection that the Congress delegated to the FPC to administer. As evidenced from the statistics, *supra,* the situation today is not one of competition but of substantial monopoly. Phillips wants the monopoly market it now enjoys in interstate commerce but does not want any control over the maximum price it charges in that market.

Though, as noted, *supra,* the FPC initially brought about many decreases in rates, the inflationary trend in the late 40's necessitated higher rates. During the year 1953, gas rate increase applications in the amount of $212,131,800 were under consideration by the FPC. Of this total, $32,515,600 was allowed to become effective, $11,103,800 was disallowed, and $5,657,600 was withdrawn by the companies. The remaining $162,844,800 was suspended pending final disposition by FPC and $138,416,000 was effective under bond, subject to refund. (*Thirty-third Annual Report of the Federal Power Commission,* 1953, p. 101).

Users definitely are on an unequal footing with the natural gas octupi, whose pipelines now extend like tentacles into the most remote communities of the United States. If FPC does not protect them under the Act no one can.

Local distribution companies have instituted, city by city, a changeover in equipment as natural gas became available. Users are absolutely dependent upon suppliers such as Phillips. Stoves, heating units and hot water heaters have been converted to this product at an expense of millions of dollars—in fact it is believed that the investment in this consumer equipment far exceeds the value of

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[14] In *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 163 this Court noted that a consumer market of 12,000,000 persons is supplied by gas Phillips sells to the pipelines there involved.

all other investments in the natural gas industry. Natural gas is now the only product that can be utilized by this equipment. The user or local distribution company cannot change products or be supplied by another seller if the particular company upon whom he is dependent increases the price. These pipelines cannot be moved like a garden hose. They are wedded to the source of supply and must buy gas from the pipeline which serves them and pay the price exacted by sellers such as Phillips. Unless FPC has jurisdiction to control the fairness of that price, no control exists.

Should the gasoline for his automobile prove unsatisfactory, or should his cigarettes disagree with him, there is the simple expedient open to the user of changing brands. But the only choice open to the person who is serviced by a natural gas company, which furnishes the wherewithal to enjoy a warm home, or a hot meal, is to endure whatever the particular inconvenience is or to use another fuel.

This, patently, is no choice at all. Once a person has installed costly gas burning equipment with which to heat and cook, then the cost of changing to another fuel, measured in terms of time, inconvenience and most important of all, money, is absolutely prohibitive. Congress was fully aware of these facts when it provided FPC regulation of all sales in interstate commerce for resale. To distort what Congress actually said so as to limit it to sales *by* pipelines, eliminating sales *to* pipelines in interstate commerce would be to ignore the obvious evils which that language was designed to meet.

4. The rapidly increasing prices for natural gas are directly attributable to a tremendous rise in field prices, "escalator" clauses (which are built-in inflation), and "favored nation" clauses.

With demand far outrunning supply, the field price situation is one fraught with inherent dangers to the consumer. Under the procedure presently in effect, the Federal Power Commission allows pipline companies under its jurisdic-

tion to pass on to consumers the full price paid by them to so-called independent sellers of gas in the field. The sharp rise in rate increase applications, *supra*, is evidence of this.

"Escalator" clauses are embodied in most existing contracts between the pipeline companies and suppliers such as Phillips. These clauses provide that base prices shall be revised upward to take certain tax levies into consideration, or when the cost of living index reaches a certain point and IF the Federal Power Commission grants the pipeline company a higher rate, the price of the supplier to the pipeline company is also increased, according to a specified formula. See, for example, the *Michigan-Wisconsin* rate cases, FPC Docket Nos. G-1678 and G-1996.

An example of the astounding rise in prices is afforded by Exhibit 54, R. III. 1053-1068, in the *Phillips* case. The outside sales of natural gas by Phillips in the year 1950 were at an average price of 4.16¢ per mcf. Recently the FPC in *Gulf Interstate Gas Co.*, opinion No. 251, Docket No. G-2058 issued May 20, 1953, stated that the initial price of 20¢ per mcf for gas from the Erath Field in Louisiana represented "the highest cost for purchased gas in the southwestern gas producing areas of the United States that had been submitted to us for consideration in connection with any proposed pipeline project, such as that of Gulf Interstate."

According to an article in the Wall Street Journal, field prices of natural gas are two to three times higher than right after World War II. Compared to pre-war days, gas coming out of the ground is up as much as five times in value and a constant increase has been predicted. In 1940 gas generally sold at one to two cents for a thousand cubic feet. Even in 1945 most producers received only two to three cents—a lucky handful got four to five cents. In many cases, the wellhead price is now eight to ten cents or more. A leading supplier believes new contract field prices will shoot up to 20 cents in Texas and 25 cents in Louisiana within five years.

A large number of rate boost applications, based largely on rising field prices, are pending before the FPC, State and local regulatory authorities. One pipeline company official has stated:

> "I expect to be back for a rate boost every year, as long as field prices keep going up."

("Costlier Cooking," The Wall Street Journal, April 14, 1953, p. 1.)

"Favored nation" clauses make it incumbent upon a pipeline company to pay the highest price paid by any other particular purchaser in that field or district. As one seller increases prices, the others likewise receive it from purchasers. See, for example, the *Gulf Interstate Gas Co.* opinion, *supra*. Couple this with the escalator clauses and the possibilities for rampant prices are obvious.

While in the beginning the small market for natural gas, lack of pipelines, and other factors held so-called field prices down, that situation is now changed. With this change the demand for gas far exceeds available supply and to get gas the pipelines must pay higher and higher prices. And as this Court noted in the *Interstate* case, *supra*, page 4, these prices exacted by sellers are firmly imbedded in the rate consumers must pay. Without FPC control over such sellers the purpose of Congress in enacting the Natural Gas Act will be frustrated and defeated. The sky will be the limit if the so-called "independent producers" like Phillips are not subject to some type of maximum price regulation by FPC. To rewrite what Congress said and make that language cover only sales by pipelines at the end of their lines, as Petitioners now urge, finds no possible justification.

5. The cost to users of removing FPC jurisdiction over Phillips, and similar sellers of natural gas, has been estimated at $200,000,00 annually.

As their prices moved ever upward in a rapidly expanding market Phillips and other sellers of natural gas in interstate commerce for resale grew concerned that FPC would step in under the Act to roll back prices found to be exorbitant.

In 1940 when it declined to exercise jurisdiction over incidental sales in interstate commerce (*Columbian Fuel Corp.* case, 2 F. P. C. 200) the FPC mentioned stepping in if unreasonable prices were charged. When FPC asserted and was finally upheld in its jurisdictional claims in the *Interstate* case (*Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682) Phillips and like sellers of gas knew their time had come. They recognized that there is simply no reasonable distinction between *Interstate* and sellers such as Phillips. In its prospectus filed with the SEC in 1947, before FPC proceedings were initiated, Phillips expressly admitted that its operations involve the sale and transportation of natural gas in interstate commerce, so as to constitute it a "natural gas company" under the Act. It said:

> "Although such sales and the transportation of natural gas antecedent thereto constitute operations by the company as a 'natural gas company' under the Natural Gas Act, and, as such, are subject to Federal Power Commission's jurisdiction, unless the exercise of such jurisdiction constitutes an interference with State regulation of production or gathering, the Commission, with Commissioner Draper dissenting in a declaration made on the 15th day of August 1947, disclaimed the intention to exercise jurisdiction over such sales if made at arm's length, that is, sales made as an incident to the producing or gathering operation by a producer or gatherer of gas to a non-affiliate (order No. 139, docket No. R-106)" (R. V. 1782.)

True it is that in the instant case the majority of FPC seized upon a statement in *Interstate* and found expressly

that a conflict with state conservation exists here where none existed there. But the statement in *Interstate* has no basis in the express statutory language of the Natural Gas Act, and, not being the basis for decision there, cannot be looked upon as controlling this case.

The first move of gas sellers was to seek legislative exemption from the Act. Labeling themselves as "independent producers" of natural gas, these sellers sought through the Moore-Rizley[15] and Kerr Bills[16] freedom to charge what the traffic would bear. These bills would have given the gas companies such as Phillips absolute freedom in setting their own rates in arm's length dealings. It was elicited in the testimony that 86 per cent of all natural gas reserves are owned by non-pipeline company producers like *Phillips* (Hearings Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 1498, 81st Cong., p. 13, Table 2) and that 58 per cent of the gas entering interstate pipelines in 1947 was purchased from independent producers. Further, by 1952 there would be an estimated increase to 70 per cent. (Hearings on S. 1498, *supra,* p. 16, Tables 7 and 9.)

There was testimony by FPC Commissioner Leland Olds that if the Bill became law a conservative increase in charges to users of $200,000,000 annually was estimated. This increase was based on a possible 5 cent per mcf rise in field prices over the years on purchases of pipeline companies from producers in the Southwest. (Hearings on S. 1498, *supra,* p. 16, Table 10 and p. 283).

Knowing that Congress would not override the Presidential veto of the Kerr Bill (H. Doc. 555, 81st Cong., 2nd Sess., 1950), the effort for legislative change in FPC jurisdiction was abandoned.[17] But the fact that such sellers of

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[15] See footnote [1].

[16] *Ibid.*

[17] The vote in the Senate for the Kerr bill had been 44 to 38, 96 Cong. Rec. 4304 (1950) and in the House 176 to 174, 96 Cong. Rec. 4568 (1950).

natural gas believed FPC had jurisdiction over their sales is significant.

When an industry has dependent upon it the number of States, cities and people that are involved here, with the industry enjoying a monopoly market, regulation is a *sine qua non.* The industry, if freed of FPC jurisdiction, has within its power the right to charge exorbitant and unreasonable rates, rates which would be completely out of line with a just and adequate return on their investment and the service rendered to the consumer. Without FPC regulation the user will be without redress. They have made users absolutely dependent upon their facilities and now seek to avoid reasonable regulation. When companies assume this size they owe a duty to the public which they are serving, in exchange for the monopoly market they enjoy, to charge fair and reasonable rates. To insure the carrying out of that duty under our system of free enterprise statutory regulation is provided. This is and has been true of all utilities enjoying monopoly markets so Phillips was not treated any differently by Congress than others in the same circumstances traditionally have been treated. To say that Congress could not have intended to bring Phillips within FPC's regulating ambit is to deny basic traditions inherent in Congressional action in similar instances. Phillips and other sellers now enjoy a market where demand outstrips supply. And it is because of this condition that they argue that their sales for resale in interstate commerce are exempt from regulation. But in 1938 when supply exceeded demand and producers were not receiving fair prices, there was no outcry against regulation when Congress moved to cure this evil, as the FPC's brief concedes (p. 64), by giving the Commission jurisdiction to fix fair prices for sales for resale in interstate commerce by producers. Now that the day has come when demand outstrips supply they do not want this regulation, but it is just as much in the statute today as it was in 1938. Today, however, the authority must be used to prevent extortionate prices.

The decisions of this Court, cited above, holding that this type of business is of national, *not local,* concern should not be ignored. If the Court of Appeals' decision be reversed then the gains made by the users over the years would be completely obliterated by this $200,000,000 annual possible increase in price to the user. The ever growing rate increase petitions to the FPC, *supra,* indicate that that estimate is probably extremely conservative. For as noted herein field prices have already increased from 10 to 15 cents per mcf, as contrasted with the five cents per mcf upon which the 200 million figure was based.

On the decision in this case rests the financial fate of millions of users whose rights are squarely in issue. Should they be denied the statutory protection which is theirs to expect and demand, then the result undoubtedly will be unregulated, exorbitant, arbitrary and unreasonable prices, which they must of necessity pay and keep paying. All the briefs of Petitioners and of *amici curiae* who support Phillips, seem to concede that higher prices would be the inevitable result of reversal. This situation should never be allowed to materialize since Congress clearly intended to prevent it and did prevent it by clear and unequivocal language.

CONCLUSION

It is respectfully submitted that in the instant case the Federal Power Commission does have jurisdiction and authority to regulate sales for resale in interstate commerce by the Phillips Petroleum Company and, therefore, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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